Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

CASTLEWOOD, INC.,

Petitioner,

vs.

ANDERSON COUNTY, TENNESSEE, PATSY STAIR, TRUSTEE, OWEN K. RICHARDSON, TAX ASSESSOR, CITY OF OAK RIDGE, TENNESSEE, and TENNESSEE STATE BOARD OF EQUALIZATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED BY THE PETITION FOR A WRIT OF CERTIORARI

Whether the Tennessee Supreme Court's decision in this case permitting identical residential condominium units to be classified differently for tax purposes and assessed differently violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT PURSUANT TO RULE 29.6

The only parties to this action are those listed in the caption. Castlewood, Inc., has no parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Petitioner, Castlewood, Inc. (hereinafter "Castlewood"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court for the State of Tennessee (hereinafter "Tennessee Supreme Court").

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 969 S.W.2d 908 (Tenn. 1998) and is reprinted in Appendix A, 1a-8a, to the Petition for Certiorari (hereinafter "Pet. App."). The opinion of the Court of Appeals for the Eastern Section of Tennessee is reprinted in Pet. App. B, 9a-16a. The judgment and order of Chancery Court for Anderson County, Tennessee are reprinted in Pet. App. C, 17a-21a.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §2101(c) and 28 U.S.C. §2104.

STATUTES/CONSTITUTIONAL PROVISIONS INVOLVED

1. The full text of Article II, Section 28 of the Tennessee Constitution is set forth in Pet. App. D, 22a-25a. Article II, Section 28, in pertinent part, classifies all real property into four sub-classifications, two of which are at issue in this case.

> (b) Industrial and Commercial Property, to be assessed at forty (40%) percent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) percent of its value, provided that Residential Property containing two or more rental units is hereby defined as Industrial and Commercial Property;

2. The full text of the Tennessee Horizontal Property Act, Tennessee Code Annotated §§66-27-101 *et seq.*, is set forth in Pet. App. E, 26a-44a. Relevant portions of the text include the following:

(a) Tenn. Code Ann. §66-27-108: "the deed of each individual apartment shall be recorded in the same manner and subject to the same provisions of law as are deeds . . . mortgages of each individual apartment be recorded subject to the provisions of law applicable to the recording of mortgages . . . other instruments conveying or affecting title to individual apartments be recorded as in the case of recording of such instruments . . . any conveyance of an individual apartment shall be deemed to also convey the undivided interest of the owner in the common element. . . . "

3. United States Constitution, Article XIV, Section 1, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In its opinion, the Tennessee Supreme Court approved a taxing scheme for residential condominium units that results in a disproportionate and unequal system. The taxation scheme approved by the Tennessee Supreme Court provides that absolutely identical residential condominium units located directly next to each other and in the same condominium complex are to be taxed differently solely on the basis of the ownership and whether the unit is rented. This taxation scheme is without any basis under Tennessee law and is in clear violation of the Fourteenth Amendment.

The facts set forth below were stipulated by the parties at the trial court level and are not in dispute.

Castlewood is a Tennessee corporation with its office and principal place of business in Oak Ridge, Anderson County, Tennessee. Castlewood, as a part of its business, developed a condominium project consisting of eighty-six (86) residential condominium units in Anderson County (hereinafter collectively referred to as "Units").

The State of Tennessee regulates by state law the manner and method of tax assessment of real property located in Anderson County, Tennessee. The assessment of real property is carried out by the duly elected tax assessor, Owen K. Richardson. Collection of real property taxes in Anderson County, Tennessee is a duty of the Trustee, Patsy Stair.

The City of Oak Ridge imposes real property tax upon the Units by adopting the tax assessment made by the Anderson County Tax Assessor.

The Tennessee State Board of Equalization, pursuant to Tenn. Code Ann. §67-5-1501, is charged with the valuation, classification and assessment of all properties in the

state, as well as being authorized to consider all appeals from local tax assessors and boards of equalization pursuant to Tenn. Code Ann. §67-5-1501.

In connection with its development of the eighty-six (86) Units, Castlewood filed the necessary instruments to affect a horizontal property regime, which is generally referred to as the "Castlewood Condominium Units." The Units are comprised of nineteen (19) buildings, each containing four (4) to six (6) individual condominium units, with a total of eighty-six (86) units, and all the Units are of comparable style and appearance.

The entire development of the Units was structured pursuant to Tennessee Horizontal Property Act, Tenn. Code Ann. §§66-27-101, *et seq.* Each Unit was offered for sale separately as a single unit residence. As of the time the original complaint was filed in this action, three Units had been sold. Between the filing of the complaint and the trial date in the Anderson County Chancery Court, three additional Units were sold. The remaining 80 Units have been and continue to be offered for sale by Castlewood as separate residential units.

Anderson County, Tennessee, acting by and through its duly elected Tax Assessor, determined that the Units should be taxed separately. Accordingly, the Anderson County Tax Assessor prepared and delivered to Castlewood separate property tax appraisal notices for each Unit owned by Castlewood for the 1992 tax year. Simultaneously, the Anderson County Tax Assessor prepared separate property tax appraisal notices for the Units sold to three separate purchasers.

Under the 1992 Tax Assessment, the Tax Assessor determined that the Units owned by Castlewood should be classified as "Industrial and Commercial Property"

under the Tennessee Horizontal Property Act, Tenn. Code Ann. §67-5-801, and imposed an assessment of forty percent (40%) of the value of each Unit for determining property taxes. The Tax Assessor further determined that the Units sold by Castlewood should be classified as "Residential Property" under the Tennessee Horizontal Property Act, pursuant to Tenn. Code Ann. §67-5-801, and imposed an assessment of twenty-five percent (25%) of the value of the property for determining the property taxes.[1]

The Units sold and assessed at twenty-five percent (25%) and the Units not sold and assessed at forty percent (40%) were constructed in the same manner in terms of appearance, size, location, construction or by any other objective standard. Each Unit contained two bedrooms. The only difference between the Units was the status of ownership.

The Anderson County Chancery Court found the residential condominium units, regardless of ownership, should all be taxed the same as "Residential" at twenty-five percent (25%) of its value. The Tennessee Supreme Court viewed this matter differently and affirmed the Tennessee Court of Appeals' reversal of the trial court. The Tennessee Supreme Court held that the 1992 Tax Assessment was constitutional court under Article II, Section 28 of the Tennessee Constitution and Equal Protection Clause of the Fourteenth Amendment.

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[1] Throughout the remainder of this Petition, the differing tax assessments on the residential condominium units made by the Anderson County, Tennessee Tax Assessor and adopted by the Tennessee Supreme Court, in its decision against the interest and position of Castlewood, shall be collectively referred to as the "1992 Tax Assessment".

In reaching its decision, the Tennessee Supreme Court held that different taxing classifications for identical residential condominium units were valid when the different classifications were based on the different status of ownership of the condominium units and whether the units were income-producing.

No rational basis exists for the classification used for the 1992 Tax Assessment. Under Tennessee and federal constitutional law, the 1992 Tax Assessment violates the Equal Protection Clause because the 1992 Tax Assessment and the taxing scheme approved by the Tennessee Supreme Court allows for inequality in the taxation of similarly situated property owners based on factors not set forth in the Article II, Section 28 of the Tennessee Constitution and the Tennessee Horizontal Property Act.

Thus, the 1992 Tax Assessment violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

STATE COURT PROCEEDINGS

Following the issuance by the 1992 Tax Assessment, on September 28, 1992, Castlewood appealed the 1992 Tax Assessment to the Tennessee State Board of Equalization. A hearing on the appeal was scheduled before the Administrative Law Judge for the State Board of Equalization; however, prior to the hearing, Castlewood withdrew its appeal. The Administrative Law Judge, without a hearing, entered an initial decision and order dismissing appeal on March 5, 1993. On May 4, 1993, the official certificate of the Tax Assessment from the appeals commission was issued.

On June 22, 1993, Castlewood filed a complaint in the Chancery Court for Anderson County, Tennessee challenging the validity and constitutionality of the 1992 Tax Assessment. A copy of the Complaint is reprinted in Pet. App. F, 45a-51a.

In paragraph 17 of the Complaint, Castlewood specifically averred as follows:

> 17. The actions of the State as reflected in the actions taken by the individual Defendants constitute violations of the Constitution of the United States and the Fourteenth Amendment. Pet. App. F, 50a.

Castlewood further sought a finding by the trial court that the classification imposed upon the Units through the 1992 Tax Assessment violated the Tennessee Constitution, Article II, Section 28 and the Tennessee Horizontal Property Act. Castlewood petitioned the court to invalidate the 1992 Tax Assessment and find that all Units should be classified and taxed as "Residential".

On May 8, 1995, the State Board of Equalization filed a Motion to Dismiss the Complaint. Anderson County and the City of Oak Ridge joined in the Motion. On January 24, 1996, the Motion to Dismiss was overruled.

Thereafter, the parties stipulated as to the relevant facts in the trial court. Based on the stipulated facts, entire record, statements and arguments of counsel, the trial court held the 1992 Tax Assessment invalid. See Pet. App. C1. The trial court held that the Units, whether sold or retained by Castlewood, should be classified and taxed equally as "Residential Property" and assessed at twenty-five (25%) percent of its appraised value, pursuant to Article II, Section 28 of the Tennessee Constitution. See Pet. App. C, 17a-21a.

On January 31, 1996, the Defendants appealed to the Tennessee Court of Appeals. On December 17, 1996, the Tennessee Court of Appeals vacated the judgment of the trial court by holding that the Units not yet sold but retained by Castlewood should be classified as "Industrial and Commercial" rather than "Residential". See Pet. App. B, 9a-16a.

The Court of Appeals dealt with the constitutional issues raised by the parties, albeit not well articulated, as follows:

> We acknowledge that both parties' positions are well reasoned; however, *fundamental fairness* leads us to the conclusion that the Appellee's condominium units should be classified as industrial and commercial property. The Horizontal Property Act should not be read *to provide condominium renters a safe haven from the higher tax rate.* As long as two or more condominium units are being used as rental units, the property will be classified as commercial. Our decision falls clearly within the constitutional intent to classify income producing property as commercial. (Emphasis added) Pet. App. C, 15a.

The Tennessee Court of Appeals attempt to justify the 1992 Tax Assessment on the basis of "fundamental fairness" was improper. "Fundamental fairness" is not a standard by which an equal protection issue is to be analyzed.

On February 12, 1997, Castlewood filed an application for permission to appeal the Court of Appeals decision to the Tennessee Supreme Court. The application for permission to appeal was granted. In the appeal, Castlewood specifically argued that the 1992 Tax Assessment violated the Equal Protection Clause of the Fourteenth Amendment.

On June 1, 1998, the Tennessee Supreme Court affirmed the decision of the Tennessee Court of Appeals holding that:

> This case presents for review the Court of Appeals' decision that the classification as industrial and commercial of two or more condominium units rented by the owner to others for their use as a residence does not violate Article II, Section 28 of the Tennessee Constitution. Nor does the statute violate the equal protection clause of the United States Constitution. That decision is affirmed. Pet. App. A, 2a.

Castlewood now petitions for a writ of certiorari for this court to review the decision of the Tennessee Supreme Court. The 1992 Tax Assessment taxes absolutely identical properties unequally. The method approved by the Tennessee Supreme Court does not rationally advance any legitimate state interest and result in a violation of the Equal Protection Clause of the Fourteenth Amendment and should be set aside.

REASONS FOR GRANTING WRIT OF CERTORIARI

Constitutionally, the 1992 Tax Assessment violates the Equal Protection Clause. Similarly situated property owners are being assessed and taxed differently based on a scheme that focuses on the ownership of the property or the income produced by the property. This standard for determining and assessing real property taxes is not authorized in the Tennessee Constitution or the Tennessee Horizontal Property Act.

The Tennessee Supreme Court's decision approves a taxation scheme whereby the taxing authority examines the ownership of the Units and whether the Units were income-producing in assessing taxes. The tax scheme

does not account for discrepancies in taxes assessed against an investor who owns one, two, three or many more single family dwellings, as opposed to residential condominium units. An owner of multiple single family dwellings would, under the Tennessee Supreme Court's decision, be taxed separately on each rented dwelling and would only be issued a twenty-five percent (25%) tax assessment. Logic would dictate that it is not the nature of the investment that should be taxed but the property itself. Single family dwellings, whether as a detached residence or condominium, are similar properties that should be taxed equally.

The 1992 Tax Assessment and the Tennessee taxing scheme violates the Equal Protection Clause because it allows for disproportionate and unequal taxation for absolutely identical condominium units. Castlewood, as an owner of numerous condominium units, is being discriminated against because the 1992 Tax Assessment results in a gross disparity in the taxes assessed to Castlewood and the assessed values of absolutely identical condominium units located directly next to the Units owned by Castlewood and in the same complex.

A need exists to procure the settlement of the important questions of law and public interest associated with the 1992 Tax Assessment and the taxation scheme allowed in Tennessee. The issues raised in this petition are critical to the determination and methodology to be used by tax assessors throughout the State of Tennessee in the classification of condominium dwelling units for real property tax purposes. Thus, the petition for certiorari should be granted.

LEGAL ARGUMENT

I. THE 1992 TAX ASSESSMENT SCHEME AND CLASSIFICATION APPROVED BY THE TENNESSEE SUPREME COURT FOR RESIDENTIAL CONDOMINUM UNITS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. THE 1992 TAX ASSESSMENT ARBITRARILY DISCRIMINATES AS TO OWNERS OF ABSOLUTELY IDENTICAL CONDOMINIUM UNITS.

The tax assessment scheme and classification adopted by the Tennessee Supreme Court for residential condominium units violates the Fourteenth Amendment because it fails to follow the dictates of Article II, Section 28 of the Tennessee Constitution and the Tennessee Horizontal Property Act.

The 1992 Tax Assessment arbitrarily discriminates against certain owners of absolutely identical condominium units because the ownership of the units is used as a factor for establishing a tax classification. Under Tennessee law, ownership is not a factor to be used in classifying residential condominiums for tax purposes.

In 1971, the limited Tennessee Constitutional Convention amended Article II, Section 28 of the Tennessee Constitution to provide for the classification of real property for tax purposes into four sub-classifications.

Specifically, Article II, Section 28 provides for a classification of all real property into four sub-classifications, two of which are at issue in this case, Industrial and Commercial Property and Residential Property. Although it makes no specific reference to condominium units, or any distinctions based upon the ownership or use of the

units, or whether the units are income-producing or not, Article II, Section 28 does require equality within each class or subclass.

> The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

The taxing scheme enunciated in Article II, Section 28 is further developed by the statutory provisions enacted by the Tennessee Legislature. The county tax assessor, acting pursuant to the Constitution and the State statutes, is called upon to identify each ***parcel*** of taxable, real property, to determine its value, to classify and subclassify the parcel, and to apply the proper assessment. Tenn. Code Ann. §67-5-804.

In issuing the 1992 Tax Assessments, the Anderson County Assessor generally followed this procedure. Each Unit was treated as a ***separate parcel*** of property and was issued a ***separate tax bill***. Importantly, as should be the case for identical Units, the valuations of each parcel were equal. Nevertheless, in determining the 1992 Tax Assessment, the tax assessor looked at two units that were physically identical, yet he assessed one at twenty-five percent (25%) of its value and the other at forty percent (40%) of its value, depending upon its ownership. The sole reason for the different assessments was the difference in ownership.

The 1992 Tax Assessment does not comply with the dictates of the Horizontal Property Act. The Tennessee Horizontal Property Act was adopted in 1963 and is

subject to and in fact fulfills the requirements of Article II, Section 28 of the Tennessee Constitution, which provides that "the ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner *as the Legislature shall direct.*" (Emphasis added)

The Legislature, in enacting the Horizontal Property Act, provided in part as follows:

> Taxes, assessments and other charges of any taxing unit of this state, or of any political subdivision, or any other taxing or assessing authority shall be assessed against and collected on each individual apartment, each of which shall be carried on the tax books as a separate and distinct entity for that purpose, and not on the building or property as a whole.

Pursuant to Tenn. Code Ann. §66-27-101, *et seq.*, each condominium unit must be treated for tax purposes as a separate parcel of property in the same manner as a single family residence. The ownership or the use of the condominium unit is not a consideration in establishing value for tax purposes. The statutes clearly provide that "the value of all property shall be ascertained from the evidence of its sound, intrinsic and immediate value, for purposes of sale between a willing seller and a willing buyer without consideration of speculative values. . . . " Tenn. Code Ann. §67-5-601(a).

No provision of Article II, Section 28 or the Tennessee Horizontal Property Act provides that ownership is a factor to consider in classifying and assessing property taxes. By considering the ownership in classifying the Units, the Tennessee Supreme Court improperly classified

and approved an unequal tax assessment scheme on absolutely identical properties.

The decision by the Tennessee Supreme Court approving the 1992 Tax Assessments based on this distinction violates both Tennessee law and the Equal Protection Clause of the Fourteenth Amendment. The Tennessee Supreme Court has now expressly authorized tax assessors to arbitrarily discriminate against certain owners of residential condominium units based on the status of ownership.

In addition, the Tennessee Supreme Court, opined that whether the Units were income-producing was a factor for consideration when classifying the units for tax assessment. Tennessee Supreme Court adopted the rationale of the Court of Appeals that the constitutional intent of Article II, Section 28 was to classify and differentiate residential condominium units as "Industrial and Commercial" if the units were income-producing property as commercial. See Pet. App. A1.

The Tennessee Supreme Court's argument regarding the "constitutional intent" of Article II, Section 28 ignores the clear language of Article II, Section 28. Specifically, Article II, Section 28 does not mention, refer or incorporate "income producing" as a test for classifying property. If that was to be the test for establishing a subclass, then the constitutional framers in the limited constitutional convention could have used those exact words in amending Article II, Section 28.

The phrase "income producing" stems from an earlier decision of the Tennessee Supreme Court in *Snow v. City of Memphis*, 527 S.W.2d 55, 66 (Tenn. 1975), where the court held, "the purpose and objective of the Question 3

amendment is to tax income producing property at a higher rate than owner-occupied residences and farms."

The reliance by the Tennessee Supreme Court on *Snow* is misplaced. *Snow* stands for the proposition that in all cases a single family residence is to be assessed at twenty-five percent (25%) of its value no matter who owns it and without regard to how it is used. For example, you could have two families living in a single family house, but the assessment remains at twenty-five percent (25%). You could have one owner owning and renting many single family houses to others, and those houses would still be assessed at 25%.

There is no mention of condominiums in the *Snow* opinion, and the teaching of the *Snow* opinion can best be illustrated by a chart used by the Petitioner in the trial court. See Pet. App. G, 52a.

The chart, Pet. App. G, illustrates six parcels of property for tax purposes, each with a single family residence on each parcel. Each parcel is assigned a separate tax number by the tax assessor, and whether those houses were owned by one person or by six persons, they would all be taxed at 25% of value.

Again, under *Snow*, duplexes, in accordance with the statutory definition, would also be taxed at twenty-five percent (25%), provided one unit was owner-occupied. If in fact the owner owned two other duplexes next door and leased them out, then those duplexes, which are identical, would be taxed at 40%.

At the top of Appendix G, a condominium has been sketched and an apartment building has been sketched. Clearly, under the Constitutional definition and the statutory system adopted, the apartment building located on one parcel of property with four apartment units would

be taxed at 40%. The condominium contains four parcels of property, and a tax assessor following the dictates of Tenn. Code Ann. §66-27-120 is obligated to tax each parcel separately. When, however, there is only one unit on each parcel, the Constitution would treat each parcel the same as a single family residence to be taxed at 25%. To tax any other way would create a nightmare of establishing assessment based upon ownership and create inequality among identically situated property owners.

As an example of the confusion created when attempting to assess property taxes based on ownership, consider the scenario when one person owns three separate condominium units in three separate buildings all held for rental purposes. If that same owner owned three condominium units in one building – all held for rental purposes – under the decision of the Tennessee Supreme Court, all would be taxed at 40% because of their location in the same building as contrasted to being three separate units in three buildings. Conversely, the same investor who owned one, two, three or many more single family dwellings, which said dwellings were rented for income tax purposes, this investor would only pay a twenty-five percent (25%) assessment. Logic would dictate that it is not the nature of the investment that should be taxed but the property itself, and similar properties should be taxed equally.

Thus, the reliance by the Tennessee Supreme Court on the *Snow* decision is not controlling. The Constitutional Convention and the State Legislature are charged with knowledge of the Horizontal Property Act and the enabling legislation that was developed to afford condominiums a place in the statutory scheme.

Due to the fact that Article II, Section 28 does not specifically address condominium units, the provisions of Tenn. Code Ann. §66-27-122 set forth the tax treatment to be afforded the condominium.

> Wherever the application of the provisions of this Chapter – the Horizontal Property Act – conflicts with the application of such other provisions, the provisions of this Chapter shall prevail.

Under the Horizontal Property Act condominiums are treated the same as single family residential homes. Specifically, Tenn. Code Ann. §66-27-104 provides that a condominium can be:

> [I]ndividually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridic acts inter vivos . . . as if it were sole and entirely independent of the other apartments in the building of which they form a part. . . .

Tenn. Code Ann. §66-27-108 provides that:

> the deed of each individual apartment shall be recorded in the same manner and subject to the same provisions of law as are deeds . . . mortgages of each individual apartment be recorded subject to the provisions of law applicable to the recording of mortgages . . . other instruments conveying or affecting title to individual apartments be recorded as in the case of recording of such instruments . . . any conveyance of an individual apartment shall be deemed to also convey the undivided interest of the owner in the common element . . .

The legislature recognized that a condominium unit, or apartment, as referenced in the statutes, is to be treated the same as a single family residence in all respects. Each condominium unit is to be taxed as a

separate parcel of property. A condominium is a residential unit and should be taxed the same as a single family dwelling, without regard to who owns it or how many units the owners may possess. Neither the Tennessee Horizontal Property Act nor Article II, Section 28 provide that a finding of whether the condominium units are income-producing or not is a factor to consider in classifying and assessing property taxes. The concept of "income-producing" is not controlling on a tax assessment, but is an arbitrary and discriminatory factor that is not authorized nor intended by the Tennessee legislature to be used in assessing property taxes.

Under the above-described constitutional and statutory background, the 1992 Tax Assessment was issued. Based on the sub-classifications set forth in Article II, Section 28, the trial court correctly found that the Tennessee Horizontal Property Act recognized that condominium dwelling units were to be treated in the same manner as single family residences with their value to be determined in accordance with the statutory scheme and without regard to how the property was owned or how it was used. See Pet. App. C1. The trial court further properly found that the statutes in Tennessee require that residential condominium units be taxed equally regardless of ownership. See Pet. App. C1.

Nevertheless, the Tennessee Supreme Court ignored the constitutional and statutory requirement of equality in the tax assessments of identical properties. The Tennessee Supreme Court found that ownership of the property and whether the property was income-producing to be determinative factors in the classifying and assessing different taxes on identical condominium units despite no

legal authority to support this finding. See Pet. App. A1 and B1.

The 1992 Tax Assessment is improper. The Tennessee Supreme Court relied upon factors that are not supported or mandated by the Tennessee Constitution or applicable statutes. In adopting and recognizing these improper factors, the Tennessee Supreme Court approved a tax scheme that violates the required concept of equal taxation for similar properties. Thus, the 1992 Tax Assessment is not valid and the decision of the Tennessee Supreme Court should be reversed.

B. A FINDING THAT THE 1992 TAX ASSESSMENT SCHEME AND CLASSIFICATION APPROVED BY THE TENNESSEE SUPREME COURT FOR RESIDENTIAL CONDOMINUM UNITS VIOLATES THE EQUAL PROTECTION CLAUSE IS SUPPORTED BY PRIOR DECISIONS OF THIS COURT.

As set forth above, the Tennessee Supreme Court's decision fails to comply with Tennessee law and arbitrarily taxes owners of absolutely identical condominium units differently. Thus, the 1992 Tax Assessment further violates the Equal Protection Clause of the Fourteenth Amendment. As such, this petition should be granted to reverse the arbitrary, discriminatory classifications approved in Tennessee that result in unequal taxation.

The Equal Protection Clause commands that no state shall "deny to any person within its jurisdiction equal protection of the laws." Although the Equal Protection Clause does not forbid classifications, it simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike. *Nordlinger*

v. Hahn, 505 U.S. 1, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992).

"Unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause requires only that the classification further a legitimate state interest." *Nordlinger*, 505 U.S. at 10; quotations omitted.

The standard of review when an Equal Protection challenge is made as to tax classifications and assessments is as follows:

> [I]f distinctions between similarly situated individuals are to withstand an equal protection analysis, such distinctions must be reasonable, not arbitrary, and must rest on grounds having a fair and substantial relation to the object of the legislation. *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 1377-78, 43 L.Ed.2d 688 (1975).

The Equal Protection Clause is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352 (1918).

The Equal Protection Clause requires that a plausible policy reason exist for the difference in tax classification. Further, the legislative facts must show that the classification and distinction is rationally based upon facts considered by the governmental decision maker and that the classification is not arbitrary or irrational. *Nordlinger*, 505 U.S. at 13.

In structuring internal taxation schemes, the states and legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. In order for

a classification scheme to be constitutional under the Equal Protection Clause, the scheme must rationally advance a reasonable and identifiable governmental objective. *Schweiker v. Wilson*, 450 U.S. 221, 235 101 S.Ct. 1074, 1083, 67 L.Ed.2d 186 (1981).

Despite the equality of the Units in terms of construction, appearance and location, the Units were arbitrarily given different tax assessments despite the clear call for equality of assessment within sub-classifications contained in Article II, Section 28 of the Tennessee Constitution and the Equal Protection Clause.

This Court has not addressed the simple issues raised in this petition. In this action, the facts are undisputed that a different tax assessment was made as to absolutely identical properties located directly next to each other in the same condominium complex. Thus, in this matter, this court is not dealing with classifying property in a class or general neighborhood or district area, such as commercial or agriculture zone; rather, this court is faced with the question of whether a taxing scheme that allows for a tax assessor to issue different tax assessments as to absolutely identical properties located directly next to each other violates the Equal Protection Clause.

This Court has previously addressed the issue of taxing schemes under the Equal Protection Clause. These decisions provide guidance in finding that the 1992 Tax Assessment violates the Equal Protection Clause.

The 1992 Tax Assessment is analogous to the "welcome stranger property tax assessment system" utilized by Webster County, West Virginia in *Allegheny Pittsburgh Coal Co. v. County of Webster County, West Virginia*, 488 U.S. 336 (1989) which was found to violate the Equal Protection Clause.

In *Allegheny Pittsburgh*, the Court examined the "welcome stranger property tax assessment". This method of tax assessment was the product of a practice instituted by the Webster County tax assessor. Between 1975 and 1986, the Webster County tax assessor made minimal across-the-board adjustments in the assessments of properties that had not been recently sold, raising assessed values on those properties by only 10% in 1976, 1981 and 1983, respectively. Upon sale, however, the assessor uniformly reassessed properties to current market value based upon the declaration of value filed at the time of transfer. Over time, this taxing scheme created a gross disparity in the assessed value of generally comparable property. In fact, the petitioners' property was assessed and taxed at roughly 8 to 20 and 35 times, respectively, that of comparable properties. *Allegheny Pittsburgh*, 488 U.S. at 338, 341.

The West Virginia Supreme Court of Appeals held that the assessor's welcome stranger tax assessment practice did not violate state law. This Court, however, in *Allegheny Pittsburgh*, unanimously held that the welcome stranger property tax assessment system "resulted in gross disparities in the assessed values of generally comparable property" and violated the Equal Protection Clause. *Allegheny Pittsburgh*, 488 U.S. at 338, 346.

In finding a violation of the Equal Protection Clause, this Court held that states may impose and collect taxes by dividing "different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable." *Allegheny Pittsburgh*, 488 U.S. at 344, citing *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959). However, in *Allegheny Pittsburgh*, the Supreme Court found that Webster

County's welcome stranger property tax assessment system was unconstitutional because this Court could find no legitimate basis for the classes or distinctions used in the assessments to justify the difference in the assessments. 488 U.S. at 344-45.

This Court further opined that "the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." 488 U.S. at 346.

In *Allegheny Pittsburgh*, the taxation policy forced one group of disfavored taxpayers (the new buyers) to pay taxes on the current full market value based on their acquisition prices whereas another otherwise indistinguishable and "similarly situated" group (the existing property owners) were assessed and paid far lower taxes based on infrequent across-the-board reassessments. This practice was found by this Court to be woefully inadequate to "equalize the difference in proportion between the assessments of a class of property holders." 488 U.S. at 343.

The constitutional flaw in *Allegheny Pittsburgh* was that the over-the-board adjustments were not designed to equalize assessments within comparable classes of taxpayers over a short, transitional period of time. 488 U.S. at 342-43.

The 1992 Tax Assessment and the taxing scheme generally approved by the Tennessee Supreme Court correlates with the unconstitutional taxing scheme in *Allegheny Pittsburgh* and should be found unconstitutional. The arbitrary distinctions made as between two absolutely identical Units in order to assess one Unit at forty percent

(40%) of its value and the other Unit at twenty-five percent (25%) of its value does not produce a "seasonable attainment of a rough equality in tax treatment of similarly situated property owners." *Allegheny Pittsburgh*, 488 U.S. at 342-43.

Based on the classifications approved by the Tennessee Supreme Court, at no time while Castlewood owns any of the Units will it be taxed equally with other owners of identical, adjoining Units. The taxing scheme cannot at any point be justified on the basis that at a later date the initial disproportionate tax assessment to Castlewood will be equalized in proportion to the assessments of absolutely identical condominium owners. See, *Allegheny Pittsburgh*, 488 U.S. at 343.

The decision in *Allegheny Pittsburgh* has been slightly distinguished by this court in *Nordlinger v. Hahn*, supra, whereby this Court again dealt with a taxpayer action. In *Nordlinger*, the petitioners challenged a California property tax system, Proposition 13; however, the distinction made in *Nordlinger* further supports Castlewood's position that the different taxation of absolutely identical properties violates the Equal Protection Clause.

Under Proposition 13, the tax on the value of real property could increase at only 2% per year except in cases of improvements to the property or change of ownership. If an improvement or change of ownership occurred, the property was taxed at the actual market value.

The petitioners in *Nordlinger*, relying on *Allegheny Pittsburgh*, challenged the assessment practices under Proposition 13 as equivalent to the "welcome stranger property tax system" previously deemed unconstitutional under the Equal Protection Clause. This time this Court

held the California system, Proposition 13, as applied to a neighborhood block area, was constitutional and found that *Allegheny Pittsburgh* was not controlling. Specifically, the Court found that the California system, unlike *Allegheny Pittsburgh*, was enacted precisely to achieve the benefits of an acquisition-value system whereas the Webster County system in *Allegheny Pittsburgh*, was "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme". 505 U.S. at 16.

In *Nordlinger*, Proposition 13 was found constitutional because eventually the initial disproportionate tax system as to similar properties would be equalized. This is not the case here. In this case, as long as Castlewood owns the units it will be assessed a disproportionate higher tax on its Units. The Tennessee Supreme Court taxed ownership in this case, not the absolutely identical Units.

Unlike the present case, in *Nordlinger*, Proposition 13 was found constitutional under the Equal Protection Clause because it did not discriminate between new and old property owners; rather, the Court found that both new and old property owners benefited under the taxing scheme. *Nordlinger*, 505 U.S. at 12. The only distinction and classification between new and old property owners was that the owners were "treated differently with respect to one factor only – the basis on which their property is initially assessed." *Nordlinger*, 505 U.S. at 12.

In this case, the arbitrary discriminatory taxing system as to Castlewood and other owners who lease condominium units will continue to be applied to absolutely identical properties differently. The taxation scheme in

Tennessee, as demonstrated by the 1992 Tax Assessment, further does not "rationally advance a reasonable and identifiable governmental objective." *Schweiker v. Wilson*, 450 U.S. at 235.

Condominium dwelling units in Tennessee were intended by the Tennessee Legislature to be treated in the same manner as single family residences with their value to be determined in accordance with the statutory scheme and without regard to how the property was owned or how it was used. Nevertheless, the decision by the Tennessee Supreme Court in allowing the tax assessor to assess taxes on condominium dwelling units based on ownership and/or income-producing status does not result in the "seasonal attainment of a rough equality in tax treatment of similarly situated property owners" as required under the Equal Protection Clause. *Nordlinger*, 488 U.S. at 342-43.

Under the decision of the Tennessee Supreme Court, the taxing scheme in Tennessee would tax each condominium unit as a separate parcel of property regardless of the fact that each condominium unit is a residential unit used for residential purposes.

Under the Equal Protection Clause, each condominium unit should be taxed the same as a single family dwelling, without regard to who owns it or as to how many units the owners may have. To permit the tax assessor to tax two units side-by-side, both being equal in all respects with one paying a twenty-five percent (25%) assessment and the other a forty percent (40%) assessment directly correlates with the unconstitutional taxing practice in *Allegheny Pittsburgh*.

The Tennessee taxing scheme, as in *Allegheny Pittsburgh*, will continue to discriminate and arbitrarily assess

higher taxes on identical properties based solely on ownership. Castlewood will forever be burdened with a higher tax assessment on its Units than identical Units owned by individuals. Thus, as in *Allegheny Pittsburgh*, the 1992 Tax Assessment and the Tennessee taxing scheme approved by the Tennessee Supreme Court violates the Equal Protection Clause of the Fourteenth Amendment in that similarly situated property owners are not taxed equally. Thus, this petition should be granted to remedy this constitutional error.

CONCLUSION

The taxation scheme approved by the Tennessee Supreme Court through the 1992 Tax Assessments violates the Equal Protection Clause. This decision opens the door and invites other tax assessors throughout the State of Tennessee to discriminate in assessing taxes against residential condominium units. The decisions rendered by this Court in *Allegheny Pittsburgh* and *Nordlinger* clearly set the parameters for when a taxing classification violates the Equal Protection Clause.

The 1992 Tax Assessment violates the Equal Protection Clause in that similarly situated property owners are not taxed equally. There is no roughly equivalent tax treatment of owners of absolutely identical property. Further, the classification made by the Tennessee Supreme Court is arbitrary and capricious in that absolutely identical condominium units, located directly next to each other, are taxed different solely on the basis of ownership thus creating a gross disparity in the assessed values of absolutely identical properties. Thus, it is evident that the 1992 Tax Assessment and the Tennessee taxing scheme

violates the Equal Protection Clause and should be set aside.

WHEREFORE, based on the foregoing, Castlewood, respectfully prays that the Petition for Writ of Certiorari be granted, that the decision of the Tennessee Supreme Court be reversed and that the 1992 Tax Assessment be set aside as unconstitutional

Submitted August 28, 1998.

Attorneys for Petitioner/Appellee

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**Counsel of Record*

APPENDIX A

June 1, 1998
FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

CASTLEWOOD, INC., Plaintiff-Appellant, v. ANDERSON COUNTY, TENNESSEE; PATSY STAIR, TRUSTEE; OWEN K. RICHARDSON, TAX ASSESSOR; CITY OF OAK RIDGE, TENNESSEE; AND THE TENNESSEE STATE BOARD OF EQUALIZATION, Defendants-Appellees.	Anderson County Hon. William E. Lantrip, Chancellor S. Ct. No. 03S01-9705-CH-00053

For Plaintiff-Appellant:

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OPINION

(Filed Jun. 1, 1998)

JUDGMENT OF COURT OF APPEALS AFFIRMED. REID, SP. J.

This case presents for review the Court of Appeals' decision that the classification as industrial and commercial of two or more condominium units rented by the owner to others for their use as residences does not violate Article II, Section 28 of the Tennessee Constitution. Nor does the statute violate the equal protection clause of the United States Constitution.[1] That decision is affirmed. That decision is affirmed.[2]

---

[1] *See* U.S. Const. Amend. XIV, § 1. The Court of Appeals did not consider the federal constitutional issue but it is asserted on this appeal.

[2] The record is insufficiently developed to address the procedural issues raised by the defendants – whether Castlewood failed to pay the disputed taxes under protest, whether failing to pay the taxes under protest prohibits an appeal of the assessment, and whether a taxpayer must appeal an assessment to the State Board of Equalization before proceeding to Chancery Court. Furthermore, the parties stipulated as follows:

> Castlewood appealed the action taken to the appropriate governmental agencies. The appeal ultimately reached the Assessment Appeals

I

The essential facts were stipulated. Pursuant to the Horizontal Property Act, [3] the plaintiff, Castlewood, Inc., developed in Oak Ridge a real estate condominium project consisting of 86 two-bedroom units situated in 19 separate buildings containing from four to six units or apartments each. The units were offered for sale as separate residences.

Six units that had been sold to individual owners were classified by the county property assessor as residential property and assessed for county and city taxes at 25 percent of value, while the remaining 80 units, which were held by Castlewood to be rented to separate occupants, were classified as industrial and commercial property and assessed at 40 percent of value.

The trial court found that the units owned by Castlewood should be classified as residential property. The Court of Appeals reversed, holding that the rental units are industrial and commercial property within the meaning of Article II, Section 28 of the Tennessee Constitution.

Commission which affirmed the Anderson County Board of Equalization and issued its official certificate on May 4th, 1993. . . . As provided for in the certificate, a dissatisfied party is entitled to judicial review by filing a petition in Chancery Court within sixty days of the date of the certificate.

[3] Tenn. Code Ann. § 66-27-101 et seq. (1993).

I

Article II, Section 28 classifies real property into four categories: public utility, industrial and commercial, residential, and farm. The constitution does not further define the classes of property other than to state, "residential property containing two (2) or more rental units is hereby defined as industrial and commercial property." The distinction between industrial and commercial and residential is set forth in the statute:

> "Industrial and commercial property" includes all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club (whether public or private), nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

Tenn. Code Ann. § 67-5-501(4) (1994).

> "Residential property" includes all real property which is used, or held for use, for dwelling purposes and which contains not more than one (1) rental unit. All real property which is used, or held for use, for dwelling purposes but which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

Tenn. Code Ann. § 67-5-501(10) (1994).

Neither the constitution, these statutes, nor the Horizontal Property Act makes any specific reference to the

classification of condominium property for taxation purposes. The Horizontal Property Act provides that taxes on condominiums "shall be assessed against and collected on each individual apartment, each of which shall be carried on the tax books as a separate and distinct entity for that purpose, and not on the building or property as a whole." Tenn.Code Ann. § 66-27-120(a) (1993). Castlewood insists that because the Horizontal Property Act deems each condominium unit to be a separate parcel for ownership and taxation purposes, its 80 condominium units are separate residential dwellings rather than "two or more rental units." The provisions of the Horizontal Property Act do not support the taxpayer's position.

There is no mistaking the meaning of the constitutional provision or the statute. The buildings owned by Castlewood contain two or more rental units held for dwelling purposes. Neither the constitution nor the statute suggests that condominiums should be classified for assessment purposes differently than other residential property. Consequently, the appropriate classification of the plaintiff's multiple condominium units is industrial and commercial.

II

In *Snow v. City of Memphis*, 527 S.W.2d 55 (Tenn.1975), the taxpayer claimed that the constitutional amendment defining residential property containing two or more rental units as commercial property violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. In that case, the Court first

noted the latitude given the states in matters of governance:

> "The States have a very wide discretion in the laying of their taxes . . . . the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."

Id. at 64 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959)).

The Court then held that the State's action will be sustained if there is a "rational basis" for the classification:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' (Citations omitted.) 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' *Brown-Forman Co. v. Commonwealth of Kentucky*, 217 U.S. 563, 573, 30 S.Ct. 578, 580 [(1910)] *State Board of Tax Com'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S.Ct. 540,

> 543 [(1931)]. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy."

Id. at 64-65. It concluded that the test of whether a classification which discriminates will survive an equal protection challenge of arbitrariness, is whether "any state of facts reasonably can be conceived that would sustain it." *Id.* at 65.

The Court in *Snow v. City of Memphis*, found that "[t]he purpose and objective of the [amendment to Article II, Section 28] is to tax income-producing property at a higher rate than owner-occupied residences and farms." *Id.* at 66.

> . . . [I]t is clear that there is discrimination in favor of the real property owner who lives in one-half of a duplex and rents the other half and in favor of the real property owner who rents one or more single-family residences. There is substantial proof in the Nashville case that single-family residences for rental purposes make a poor investment. The cost of land on the one hand and the savings to be effected in the construction and operation of multi-unit apartments render it inconceivable that any investor would be in the business of renting single-family residences. It is obvious that the Convention and the people deemed it reasonable to embrace within the favored classification of a owner-occupied residence, owners of additional single-family residences and the owner who lives in one-half of his duplex.

Id. at 66. This favored classification does not extend to the owner of the 80 condominium rental units which are, to the owner-taxpayer, income producing property.

The decision of the Court of Appeals is affirmed, and costs are taxed against Castlewood, Inc.

/s/ Lyle Reid
Lyle Reid, Special Justice

Concur:

Drowota, Birch, and Holder, JJ.

Anderson, C.J. – Not Participating.

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

CASTLEWOOD, INC. Plaintiff-Appellee v. ANDERSON COUNTY, TENNESSEE; PATSY STAIR, Trustee; OWEN K. RICHARDSON, Tax Assessor; CITY OF OAK RIDGE, TENNESSEE; and the TENNESSEE STATE BOARD OF EQUALIZATION Defendants-Appellants	)	ANDERSON COUNTY 03A01-9606-CH-00185 HON. WILLIAM E. LANTRIP, CHANCELLOR VACATED AND REMANDED

DAVID A. STUART OF CLINTON FOR APPELLANTS ANDERSON COUNTY, PATSY STAIR AND OWEN K. RICHARDSON

CHARLES W. BURSON, Attorney General of Tennessee, and CHRISTINE LAPPS, Assistant Attorney General, OF NASHVILLE FOR APPELLANT TENNESSEE STATE BOARD OF EQUALIZATION

BERNARD E. BERNSTEIN and DORIS C. ALLEN OF KNOXVILLE FOR APPELLEE

OPINION

(Filed Dec. 17, 1996)

Goddard, P.J.

This is an appeal from a judgment entered by the Anderson County Chancery Court holding that the

Appellee's condominium units should be classified as residential property and assessed at 25 percent of their value for property tax purposes rather than being classified as industrial and commercial property and assessed at 40 percent of their value.

Anderson County, the City of Oak Ridge, and the Tennessee State Board of Equalization (collectively referred to as "Appellant") raise two issues on appeal. We re-state them as follows:

> I. The Trial Court erred in denying the Appellant's motion to dismiss for lack of jurisdiction because the Appellee failed to exhaust its administrative remedies before the State Board of Equalization.
>
> II. The Trial [sic] erred in determining that the Appellee's condominiums should be classified as residential property rather than industrial and commercial property.

The facts were stipulated to by the parties and are not in dispute. The Appellee is a Tennessee Corporation with its office and principal place of business in Oak Ridge, in which it developed a condominium project consisting of 86 condominium units. In connection with its development of the condominium units, the Appellee filed the necessary instruments to effect a horizontal property regime. The condominium project consisted of 19 buildings, each containing four to six individual condominium units.

The entire development was structured pursuant to the Horizontal Property Act.[1] Each unit was offered for sale separately as a single unit residents. Six condominium units have been sold. The remaining 80 units, which continue to be offered for sale as separate residential units, are being rented.[2]

The Anderson County Tax Assessor determined that the units owned by the Appellee should be classified as industrial and commercial property and imposed an assessment of 40 percent of the value of the property for determining the property taxes. The Tax Assessor also determined that the six condominium units that were individually owned should be classified as residential property and imposed an assessment of 25 percent of the value of the property for determining their property taxes.

All 86 condominium units were constructed in the same manner in terms of appearance, size, location, construction or by any other objective standard. They were all two bedroom condominium units. The only difference was the ownership of the unit.

On September 28, 1992, the Appellee filed an appeal of its property tax assessment to the Tennessee State Board of Equalization. An Administrative Law Judge for

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[1] T.C.A. 66-27-101 *et seq.*

[2] The Appellee's complaint alleges that "in order to reduce the costs of carrying the Units and to provide for the occupancy of the Units while they are awaiting sale, those Units that have not been sold are made available for occupancy by others on a nightly, week to week, month to month, or other short term basis."

the State Board of Equalization notified the parties that the appeal would be heard on February 17, 1993. The Appellee withdrew its appeal before the matter was heard and filed suit in Anderson County Chancery Court seeking relief.

The Appellant contends that the Trial Court erred in denying the motion to dismiss for lack of jurisdiction because T.C.A. 67-5-1501 grants the State Board of Equalization jurisdiction over the valuation, classification and assessment of property,[3] and the Appellee failed to exhaust this administrative remedy. "It is a settled rule in this State and is the general rule in other jurisdictions that 'were an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act.' " *Bracey v. Woods*, 571 S.W.2d 828 (Tenn. 1978).

However, there is a well-established exception to the above stated rule that allows a party to bring suit in a state court and by-pass the administrative process when only legal issues are in dispute. "[A] taxpayer ought not to be required in all cases to go through boards of equalization or other administrative procedures in order to raise strictly legal issues." *Fentress County Bank v. Holt*, 535 S.W.2d 854 (Tenn. 1976). It is undisputed that only legal issues are at issue. Thus, the Appellee was not required to exhaust its administrative remedies. The Anderson County Chancery Court had jurisdiction to resolve the case.

---

[3] "The state board of equalization has jurisdiction over the valuation, classification and assessment of all properties in the state." T.C.A. 67-5-1501.

The Appellant next claims that the Trial Court erred in finding that the condominiums should be taxed as residential property rather than industrial and commercial property. Under the Tennessee Constitution, real property is subclassified into four categories: public utility, industrial and commercial, residential and farm. Tennessee Constitution, Article II, Section 28. The Constitution further requires that commercial real property be assessed at 40 percent of its appraised value, while residential property is assessed at 25 percent of its appraised value. The Constitution does not define the property subclassifications other than to note that "residential property containing two (2) or more rental units is hereby defined as industrial and commercial property."[4]

The Appellee contends that since the Horizontal Property Act assesses condominiums individually,[5] each condominium should be treated as a separate piece of property, just as a single family residence is treated as a separate piece of property. According to the Appellee,

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[4] See also T.C.A. 67-5-501 which provides that "[all] real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as 'industrial and commercial property.' "

[5] The Horizontal Property Act provides in part as follows:

> Taxes, assessments and other charges of any taxing unit of this state, or of any political subdivision, or any other taxing or assessing authority shall be assessed against and collected on each individual apartment, each of which shall be carried on the tax books as a separate and distinct entity for that purpose, and not on the building or property as a whole.

T.C.A. 66-27-120(a).

once the determination is made that a condominium is a separate piece of property, then application of that determination would preclude a finding that one unit, even if rented, contains two or more rental units. The Trial Court agreed with the Appellee's position and held as follows:

> The Court believes that these condominium units should not be treated differently from single family residential units, which are assessed at 25% of value without regard to their ownership. These are individual condominium units and do not constitute two or more rental units as a tax entity or a tax parcel, and they should not be treated differently from those condominium units that have been sold, all being the same residential units for tax purposes and the assessment should be at 25% of value.

The Appellant asserts that the Constitution and the Horizontal Property Act should not be read so narrowly. The Appellant relies upon a decision by the State Board of Equalization in support of its position. The Board in that case held that owners who rent multiple condominium units, built pursuant to the Horizontal Property Act, should have their property classified as commercial. The Board reasoned as follows:

> [T]he [Horizontal Property] Act requires separate assessment of condominium units but does not explicitly address the issue of classification. The state Constitution, on the other hand, clearly intends that income producing property be classified as commercial even when it is used for dwelling purposes, if the property contains more than a single rental unit. We should avoid a construction of the Horizontal Property Act

> which places it at odds with the state Constitution. Tenn. Code Ann. § 66-27-120 requires separate assessment of condominium units primarily to relieve individual condominium owners who pay their taxes of the possibility of forfeiting their interests when the building or property as a whole is sold for delinquent taxes. This purpose can be achieved without retreating from the higher classification mandated for multi-unit rental property under the Constitution.
>
> An owner of a single-family dwelling may rent the property to another without losing the residential classification. The owner of a single condominium should be treated similarly, but special circumstances are presented here. Multiple condominium units, in this case in the same building under common ownership, are here being rented to others as "apartments." Such circumstances fall clearly within the constitutional intent to classify income producing property as commercial.

In Re Powers and Associates, a decision by the Tennessee State Board of Equalization (October 6, 1988).

We acknowledge that both parties' positions are well reasoned; however, fundamental fairness leads us to the conclusion that the Appellee's condominium units should be classified as industrial and commercial property. The Horizontal Property Act should not be read to provide condominium renters a safe haven from the higher tax rate. As long as two or more condominium units are being used as rental units, the property will be classified as commercial. Our decision falls clearly within the constitutional intent to classify income producing property as commercial.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for proceedings not inconsistent with this opinion. Costs of appeal are adjudged one-half against the Appellant and one-half against the Appellee.

/s/ Houston M. Goddard, P.J.
Houston M. Goddard, P.J.

CONCUR:

/s/ Don T. McMurray, J.
Don T. McMurray, J.
/s/ Charles D. Susano, Jr., J.
Charles D. Susano, Jr., J.

APPENDIX C

IN THE CHANCERY COURT
FOR ANDERSON COUNTY, TENNESSEE

CASTLEWOOD, INC.,

Petitioner,

vs. No. 93CH667
NOTICE OF ENTRY REQUIRED

ANDERSON COUNTY, TENNESSEE,
PATSY STAIR, TRUSTEE
OWEN K. RICHARDSON, TAX ASSESSOR,
CITY OF OAK RIDGE, TENNESSEE and
TENNESSEE STATE BOARD OF EQUALIZATION,

Respondents.

JUDGMENT

(Filed Jan. 26, 1996)

This cause came on to be heard before the Honorable William E. Lantrip, Chancellor, holding the Chancery Court for Anderson County, Tennessee on December 7, 1995, upon the Complaint filed by the Petitioner, Castlewood, Inc., the Answers filed in behalf of Anderson County, Tennessee and its designated officers, and the Answer of the City of Oak Ridge, Tennessee, the argument of counsel, and the entire record.

The Court first considered a Motion to Dismiss filed by the Attorney General of the State of Tennessee in behalf of the Tennessee State Board of Equalization. The Court denied that Motion and a separate Order has been entered disposing of that matter.

At the conclusion of the argument of counsel pertaining to the Motion to Dismiss, the remaining parties, Castlewood, Inc., Anderson County and the City of Oak Ridge, through their attorneys requested a recess in an effort to agree to a stipulation as to the facts of the case.

The parties were able to agree to a stipulation as to the facts of the case, which stipulation was read into the record and becomes a part thereof.

The Court, having considered the entire record including the stipulation and having considered the argument of counsel, is of the opinion that the relief prayed for should be granted. The Court finds that the Petitioner developed a condominium project consisting of 86 two-bedroom units located on Arcadia Lane in Oak Ridge, Anderson County, Tennessee. The Anderson County tax assessor assessed each one of those units as a separate piece of property for tax purposes, assigning to each a separate parcel number and issuing separate tax bills for each unit. Those condominium units that were sold and are owned by parties other than the developer (Plaintiff herein) were treated as residential property and were assessed at 25% of value. The same type units that continue to be owned by the developer while they are offered for sale but which are rented to tenants because they have not been sold as yet are assessed as industrial and commercial property at 40% of their value. These condominium units were developed pursuant to the Horizontal Property Act T.C.A. §66-27-101. Pursuant to T.C.A. §66-27-120, each of those units should be carried for tax purposes as a separate and distinct entity. The Court believes that these condominium units should not be treated differently from single family residential units,

which are assessed at 25% of value without regard to their ownership. These are individual condominium units and do not constitute two or more rental units as a tax entity or a tax parcel, and they should not be treated differently from those condominium units that have been sold, all being the same residential units for tax purposes and the assessment should be at 25% of value.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The condominium units which are the subject of this suit and are described in the Administrative Record, a copy of which is attached hereto, should have been classified as residential property and assessed at 25% of value rather than being classified as industrial and commercial property and assessed at 40% of value, all as required by the Constitution of Tennessee, Article II, Section 28.

2. The tax assessor of Anderson County shall compute the taxes that should have been due and owing on these properties for the year 1992 and subsequent years if the properties had been properly assessed at 25% of value.

3. The Trustee of Anderson County, Tennessee and the City of Oak Ridge are directed to refund the excess taxes paid by the Petitioner along with interest as provided by law.

4. All costs of this cause are taxed 50% to Anderson County, Tennessee c/o David A. Stuart, Esq., 300 Market Street, #200, Clinton, Tennessee and 50% to the City of Oak Ridge, Tennessee c/o Robert W. Wilkinson, Esq. P.O.

Box 1, Oak Ridge, Tennessee 37831, for which execution may issue if necessary.

ENTER this 26th day of January, 1996.

/s/ William E. Lantrip
WILLIAM E. LANTRIP,
CHANCELLOR

APPROVED FOR ENTRY:

ATTORNEY FOR CASTLEWOOD, INC.

/s/ Bernard E. Bernstein
BERNARD E. BERNSTEIN

ATTORNEY FOR ANDERSON COUNTY, TENNESSEE

/s/ David A. Stuart
DAVID A. STUART

ATTORNEY FOR CITY OF OAK RIDGE, TENNESSEE

/s/ Robert W. Wilkinson
ROBERT W. WILKINSON

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing document was properly mailed to:

Christine Lapps, Esq.
Assistant Attorney General
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This 26th day of January, 1996

BERNSTEIN, STAIR & McADAMS

By: /s/ Bernard E. Bernstein

[Exhibit Omitted In Printing]

APPENDIX D

Article II, Sec. 28. Taxable property – Valuation – Rates. – In accordance with the following provisions, all property real, personal or mixed shall be subject to taxation, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except the direct product of the soil in the hands of the producer, and his immediate vendee, and the entire amount of money deposited in an individual's personal or family checking or savings accounts. For purposes of taxation, property shall be classified into three classes, to wit: Real Property, Tangible Personal Property and Intangible Personal Property.

Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40%) percent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) percent of its value, provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property; and

(d) Farm Property, to be assessed at twenty-five (25%) percent of its value.

House trailers, mobile homes, and all other similar movable structures used for commercial, industrial, or

residential purposes shall be assessed as Real Property as an improvement to the land where located.

The Legislature shall provide, in such manner as it deems appropriate, tax relief to elderly low-income taxpayers through payments by the State to reimburse all or part of the taxes paid by such persons on owner-occupied residential property, but such reimbursement shall not be an obligation imposed, directly or indirectly, upon Counties, Cities, or Towns.

The Legislature may provide tax relief to home owners totally and permanently disabled, irrespective of age, as provided herein for the elderly.

Tangible Personal Property shall be classified into three (3) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at thirty (30%) percent of its value; and

(c) All other Tangible Personal Property, to be assessed at five (5%) percent of its value; provided, however, that the Legislature shall exempt Seven Thousand Five Hundred ($7,500) Dollars worth of such Tangible Personal Property which shall cover personal household goods and furnishings, wearing apparel and other such tangible property in the hands of a taxpayer.

The Legislature shall have power to classify Intangible Personal Property into subclassifications and to establish a ratio of assessment to value in each class or subclass, and shall provide fair and equitable methods of apportionment of the value of same to this State for

purposes of taxation. Banks, Insurance Companies, Loan and Investment Companies, Savings and Loan Associations, and all similar financial institutions, shall be assessed and taxed in such manner as the Legislature shall direct; provided that for the year 1973, or until such time as the Legislature may provide otherwise, the ratio of assessment to value of property presently taxed shall remain the same as provided by law for the year 1972; provided further that the taxes imposed upon such financial institutions, and paid by them, shall be in lieu of all taxes on the redeemable or cash value of all of their outstanding shares of capital stock, policies of insurance, customer savings and checking accounts, certificates of deposit, and certificates of investment, by whatever name called, including other intangible corporate property of such financial institutions.

The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

The Legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct, and the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale or exchange. the portion of a Merchant's Capital used in the purpose of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than

the ad valorem tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

This amendment shall take effect on the first day of January, 1973. [As Amended; Adopted in Convention September 14, 1971; Approved at election August 3, 1972; Amendment approved at election, November 2, 1982.]

APPENDIX E

CHAPTER 27

HORIZONTAL PROPERTY ACT

Section

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66-27-120. Estates; identification.
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66-27-122. Construction; other laws.
66-27-123. Rental units; conversion for sale; notice.

§ 66-27-101. Title

This chapter shall be known as the "Horizontal Property Act."

§ 66-27-102. Definitions

(a) As used in this chapter, unless the context otherwise requires:

(1) "Apartment" means a part of the property subject to this chapter intended for any type of independent use, including:

(A)(i) One (1) or more cubicles of air at one (1) or more levels of space; or

(ii) One (1) or more rooms or enclosed spaces located on one (1) or more floors (or parts thereof) in a building; or

(iii) A separate free-standing building of one (1) or more floors; and

(iv) Any part of open space upon the property clearly delineated for independent use adjacent to and in connection with the use of any of the foregoing;

all of which shall have a direct exit to a public street or highway or to a common area or limited common area leading to such street or highway;

(B) Where private elements are involved, "apartment" includes the private element;

(2) "Condominium" means the ownership of single units in a multiple unit structure or structures with common elements;

(3) "Condominium project" means a real estate condominium project; a plan or project whereby two (2) or more apartments, rooms, office spaces, or other units in existing or proposed building(s) or structure(s) are offered or proposed to be offered for sale;

(4) "Coowner" means a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof which owns an apartment or apartments within the building;

(5) "Council of coowners" means all the coowners as defined in subdivision (a)(4);

(6) "Developer" means a person who undertakes to develop a real estate condominium project;

(7) "Genearl common elements" means and includes:

(A) The land whether leased or in fee simple, on which the building stands;

(B) The foundations, main walls, roofs, halls, lobbies, stairways, and entrances and exists [sic] or communication ways;

(C) The basements, flat roofs, yards, and gardens, except as otherwise provided or stipulated;

(D) The premises for the lodging of janitors or persons in charge of the building, except as otherwise provided or stipulated;

(E) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like;

(F) The elevators, garbage incinerators and, in general, all devices or installations existing for common use; and

(G) All other elements of the building rationally of common use or necessary to its existence, upkeep and safety; but where private elements are created, private elements shall not be considered to

be general common elements (notwithstanding anything herein to the contrary);

(8) "Limited common elements" means and includes those common elements which are agreed upon by all of the coowners to be reserved for the use of a certain number of apartments to the exclusion of the other apartments, such as special corridors, stairways and elevators, sanitary services common to the apartments of a particular floor, and the like;

(9) "Majority of coowners" means more than fifty percent (50%) of the coowners;

(10) "Master deed" or "master lease" means the deed or lease recording the property of the horizontal property regime. A declaration will be recorded in the case where private elements are involved; the declaration shall include the covenants, conditions, restrictions and bylaws of the townhouse corporation;

(11) "Person" means an individual, firm, corporation, partnership, association, trust or other legal entity or any combination of the foregoing;

(12) "Property" means and includes the land whether leasehold or in fee simple and the building, all improvements ad structures thereon and all easements, rights and appurtenances belonging to such land;

(13) "To record" means to record pursuant to the laws of the state of Tennessee relating to the recordation of deeds and other instruments conveying or affecting title to property;

(14) "Private elements" means and includes the lot area upon which an apartment is located and the

improvements located thereon (as described in the declaration), and for which fee simple ownership and exclusive use is reserved to that apartment only. Private elements shall exist only where each apartment in the project has a ground floor and there are no apartments located above or below the private element except the one (1) apartment located thereon. Limited common elements located upon private elements shall be deemed to be private elements;

(15) "Townhouse corporation" means a not-for-profit corporation to be organized under the Tennessee Nonprofit Corporation Act, compiled in title 48, chapters 51-68. of which all co-owners shall be members where private elements are involved.

(b) All pronouns used herein include the male, female and neuter genders and include the singular or plural numbers, as the case may be.

§ 66-27-103. Establishment

(a) Whenever a developer, the sole owner, or the co-owners of a building expressly declare, through the recordation of a master deed or lease, or by plat, which shall set forth the particulars enumerated by § 66-27-107, their desire to submit their property to the regime established by this chapter, there shall be thereby established a horizontal property regime.

(b) If there is substantial compliance with this chapter as pertaining to private elements, and if an appropriate legal opinion is obtained from an attorney licensed to

practice law in Tennessee to the effect that all legal documents required herein for the creation of a planned unit development are attached and therefore a planned unit development is created hereunder, then a planned unit development shall be deemed to have been properly organized and constituted under Tennessee law. All planned unit developments shall require a declaration, bylaws, a plat showing private and common elements, a townhouse corporation, charter and an attorney's opinion.

§ 66-27-104. Apartments; ownership

(a) Once the property is submitted to the horizontal property regime, an apartment in the building may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridic acts intervivos or mortis causa, as if it were sole and entirely independent of the other apartments in the building of which they form a part, and the corresponding individual titles and interest shall be recordable.

(b) If private elements are created, the original construction of all apartments must substantially comply with local building codes for planned unit developments, established by the appropriate local authorities for planned unit developments. If no appropriate local authority exists, then compliance must be pursuant to the southern standard building code. A certificate from a professional engineer or architect licensed to practice engineering or architecture in this state, to the effect that

construction of the apartments is in substantial compliance with such code, shall be sufficient for the attorney to rely upon in giving an opinion.

§ 66-27-105. Joint ownership

Any apartment may be held and owned by more than one (1) person, as tenants in common, as tenants by the entirety, or in any other real estate tenancy relationship recognized under the laws of the state of Tennessee.

§ 66-27-106. Owner rights

An apartment owner shall have an exclusive ownership to the apartment and shall have a common right to share, with other coowners, in the common elements of the property. Each coowner may use the elements held in common in accordance with the purpose for which they are intended.

§ 66-27-107. Recordation and contents

(a) A master deed, or lease or declaration shall be recorded in the same manner and subject to the same provisions of law as are deeds. Plats may likewise be recorded as in the case of recordation of plats as provided by law.

(b) A master deed, or lease or declaration or the plat, or any combination of them, to which § 66-27-103 refers shall express the following particulars:

(1) The description of the land, whether leased or in fee simple, and the building, expressing their respective areas;

(2) The general description and number of each apartment, expressing its area, location and any other data necessary for its identification;

(3) The description of the general common elements of the building, and the limited common elements of the building, and the private elements of the property; and

(4) Bylaws for the administration of the building as in §§ 66-27-111 and 66-27-112 provided.

(c) The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of coownership.

(d) The declaration shall provide that each owner of a private element shall own a pro rata share of the total membership in the townhouse corporation.

§ 66-27-108. Apartments; recordation and coveyance

(a) The deed of each individual apartment shall be recorded in the same manner and subject to the same provisions of law as are deeds. Likewise shall mortgages of each individual apartment be recorded subject to the provisions of law applicable to the recording of mortgages. Likewise shall other instruments conveying or affecting title to individual apartments be recorded as in the case of recording of such instruments affecting title to real property.

(b) Any conveyance of an individual apartment shall be deemed to also convey the undivided interest of the owner in the common elements, both general and limited, appertaining to that apartment without specifically or particularly referring to the same. In the case of private elements, a conveyance shall be deemed to convey the undivided membership of the private element owner in the townhouse corporation.

§ 66-27-109. Filial estates and principal property; merger

All of the coowners or the sole owner of a building constituted into a horizontal property regime may by deed waive this regime and regroup or merge the records of the filian estates with the principal property, provided, that the filial estates are unencumbered, or if encumbered, that the creditors in whose behalf the encumbrances are recorded accept as security the undivided portions of the property owned by the debtors.

§ 66-27-110. Horizontal property regime after merger

The merger provided for in the preceding section shall in no way bar the subsequent constitution of the property into another horizontal property regime whenever so desired and upon observance of the provisions of this chapter.

§ 66-27-111. Administrative bylaws

The administration of every building constituted into horizontal property shall be governed by bylaws which shall be inserted in or appended to and recorded with the master deed or declaration, as the case may be.

§ 66-27-112. Bylaw contents; modification

(a) The bylaws must necessarily provide for at least the following:

(1) Form of administration, indicating whether this shall be in charge of an administrator or of a board of administration, or otherwise, and specifying the powers, manner of removal, and, where proper, the compensation of such administrator, board of administration, or otherwise;

(2) Method of calling or summoning the coowners to assembly; that a majority of coowners is required to adopt decisions; who is to preside over the meeting and who will keep the minute book wherein the resolutions shall be recorded;

(3) Care, upkeep and surveillance of the building and its general or limited common elements and services;

(4) Manner of collecting from the coowners for the payment of the common expenses; and

(5) Designation and dismissal of the personnel necessary for the works and the general or limited common services of the building.

(b) The sole owner of the building, or if there is more than one (1), the coowners representing two thirds

(2/3) of the total apartments of the building, may at anytime modify the system of administration, but each one (1) of the particulars set forth in this section shall always be embodied in the bylaws. No such modification may be operative until it is embodied in the recorded instrument which shall be recorded in the same office and in the same manner as was the master deed or lease or plat and original bylaws of the horizontal property regime involved.

§ 66-27-113. Books of administrator; examination

(a) The administrator, or the board of administration, or other form of administration specified in the bylaws, shall keep a book with a detailed account, in chronological order, of the receipts and expenditures affecting the building and its administration and specifying the maintenance and repair expenses of the common elements and any other expenses incurred.

(b) Both the book and the vouchers accrediting the entries made thereupon shall be available for examination by all the coowners at convenient hours on working days that shall be set and announced for general knowledge.

§ 66-27-114. Expenses; proration

(a) The coowners of the apartments are bound to contribute pro rata toward the expenses of administration and of maintenance and repair of the general common elements, and, in the proper case, of the limited common

elements, of the building, and toward any other expense lawfully agreed upon.

(b) No coowner may be exempted from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to that coowner or by any other means.

§ 66-27-115. Homestead provision; applicability

The provisions of article XI, § 11 of the Constitution of Tennessee relating to homestead and exemptions and the acts of the general assembly pertaining to or implementing the constitutional provisions shall be applicable to individual apartments which shall have the benefit of such exemptions in those cases the same as in ownership of any other property, and shall inure to the benefit of the owners of such apartments, that is to say, that individual apartments in a horizontal property regime are declared to be homesteads within the purview of article XI, § 11 of the Constitution of Tennessee.

§ 66-27-116. Expenses and taxes; proration; lien

The sale or conveyance of an apartment shall in all cases be subject to all unpaid assessments against the owner thereof for such owner's pro rata share in the expenses to which § 66-27-114 refers and, if the same are not paid by the owner thereof prior to sale or conveyance, shall be a lien against the apartment and shall be paid by the new owner of the apartment. Likewise shall

taxes and other levies and assessments by governmental taxing bodies be a lien against individual apartments.

§ 66-27-117. Building insurance

The coowners may, upon resolution of a majority, insure the building against risks, without prejudice to the right of each coowner to insure his apartment on his own account and for his own benefit.

§ 66-27-118. Damaged building; reconstruction

(a) In case of fire or any other disaster, the insurance indemnity shall, except as provided in subsection (b), be applied to reconstruct the building.

(b) Reconstruction shall not be compulsory where it comprises the whole or more than two thirds (2/3) of the building. In such case, and unless otherwise unanimously agreed upon by the coowners, the indemnity shall be delivered pro rata to the coowners entitled to it in accordance with provision made in the bylaws or in accordance with a decision of three fourths (3/4) of the coowners if there are no bylaw provisions.

(c) Should it be proper to proceed with the reconstruction, the provisions for such eventuality made in the bylaws shall be observed, or in lieu thereof, the decision of the council of coowners shall prevail.

§ 66-27-119. Reconstruction costs

(a) Where the building is not insured or where the insurance indemnity is insufficient to cover the cost of

reconstructions, the new building cost shall be paid by all the coowners directly affected by the damage, in proportion to the value of their respective apartments, or as may be provided by the bylaws; and if any one (1) or more of those composing the minority shall refuse to make such payments, the majority may proceed with the reconstruction at the expense of all the coowners benefited thereby, upon proper resolution setting forth the circumstances of the case and the costs of the works, with the intervention of the council of coowners.

(b) The provisions of this section may be changed by unanimous resolution of the parties concerned, adopted subsequent to the date on which the fire or other disaster occurred.

§ 66-27-120. Estates; identification

(a) Taxes, assessments and other charges of any taxing unit of this state, or of any political subdivision, or any other taxing or assessing authority shall be assessed against and collected on each individual apartment, each of which shall be carried on the tax books as a separate and distinct entity for that purpose, and not on the building or property as a whole. The valuation of the general and limited common elements shall be assessed proportionately among the coowners of the apartment. The valuation of private elements shall be assessed against the individual owner of the private elements. No forfeiture or sale of the building or property as a whole for delinquent taxes, assessments or charge shall ever divest or in anywise affect the title to an individual apartment so long as

taxes, assessments and charges to that individual apartment are currently paid.

(b) When any ground lease affects the underlying land upon which a condominium project is located or is to be located, and if the ground lease so provides, then each apartment and its respective share of the common elements shall be deemed to be and shall be treated as a separate leasehold estate responsible for such taxes, assessments or other charges, as well as such apartment's share of ground rent which might be charged under such ground lease. Such taxes, assessments and charges, as well as such pro rata share of ground rent, shall be the obligation of the respective apartment owner during such owner's tenure as owner and shall be subject to the lien provided in § 66-27-116.

(c) If a ground lessor and a developer have entered into a ground lease of underlying land whereon the developer intends to develop a condominium project, and if the ground lease is one in which a "residential ground rent" is created under title 66, chapter 30, individual apartments and their respective pro rata or otherwise allocated share of general common elements shall be deemed to be separate leasehold estates, and the ground lessor shall agree in all such ground leases that the owners of the individual apartments shall be separate and independent obligors under such ground lease and that the default of one (1) apartment owner shall not be deemed to be a default of all apartment owners in the condominium project. Only those individual apartment owners who default on their allocated share of obligations to the ground lessor (as the same are determined in the master deed, master lease or such ground lease) shall

be deemed to be in default wit the ground lessor. The ground lessor's remedies are limited to suit and satisfaction of such default from the defaulting apartment owner, the defaulting owner's apartment, and the defaulting owner's allocated interest in the general common elements. The only positive covenant obligations which any apartment owner shall have to the ground lessor shall be:

(1) Payment of pro rata or allocated share of ground rent; and

(2) Payment of pro rata or allocated share of real estate taxes and assessments on the underlying land. The terms and conditions of this subsection shall apply only to agreements creating residential ground rents, where the land is intended by the developer to be developed into condominiums. Any other positive covenant obligations of the obligor (as "obligor" is defined in § 66-30-102) which arises under the ground lease shall be deemed to have been satisfied during the period of construction and development prior to the time that the ground lease allows the closing the sale of the first apartment. If there are any negative covenant obligations under such ground lease, then they shall be enforceable only against the individual apartment owner in violation thereof and only to the extent that such obligations are reasonably the obligation of an individual apartment owner.

§ 66-27-121. Supplemental rules and regulations

Whenever they deem it proper, the planning and zoning commission of any county or municipality may adopt supplemental rules and regulations governing a

horizontal property regime established under this chapter in order to implement this program.

§ 66-27-122. Construction; other laws

The provisions of this chapter shall be in addition to and supplemental to all other provisions of other laws of Tennessee; provided, that wherever the application of the provisions of this chapter conflict with the application of such other provisions, the provisions of this chapter shall prevail.

§ 66-27-123. Rental units; conversation for sale; notice

(a) All owners or lessors of building, apartments, rooms, office spaces, or other units (hereinafter all such terms shall be referred to as units or unit), which are presently being occupied by one (1) or more persons under a lease or other rental agreement, shall give each tenant at least two (2) months's actual notice of such owners's or lessor's intent to convert such tenant's unit from a rental unit to a condominium, condominium project or other unit which is offered or proposed to be offered for sale. Such notice shall specify that the tenant has the right to continue renting such unit at the same rental rate until the expiration of the two-month notice period required by this section.

(b) No sale of a unit which was converted from a rental unit to a unit offered for sale to a person other than the tenant last renting such unit shall be valid unless such tenant has received two (2) months' actual notice of the owner's or lessor's intent to convert such units. This

provision shall apply regardless of whether the tenant's lease or other rental agreement expires prior to the end of the two-month notice period.

(c) If an owner or lessor converts a rental unit to a unit offered for sale without giving the tenant of such unit at least two (2) months' actual notice of the conversion, such tenant may elect to remain, with or without a lease, in the unit at the same rental rate until the expiration of a two-month period from the date the tenant received such actual notice or the tenant may vacate the unit immediately upon receiving such actual notice and the owner or lessor shall pay such tenant all reasonable expenses incurred in moving to another location. If a tenant is in a position to make the election provided by this subsection and does not vacate the premises immediately, the owner or lessor shall not be obligated to pay the tenant's moving expenses. The election provided by this subsection shall apply regardless of whether the tenant's lease or other rental agreement has or would have expired prior to the end of the two-month notice period.

(d) If it is necessary for a tenant to institute a court action to enforce the provisions of this section and the tenant is the prevailing party, the court shall require the owner or lessor to reimburse the tenant for all reasonable costs incurred in bringing such action, including attorney fees, and shall tax all court costs against the owner or lessor.

(e) The provisions of this section shall apply to all units which are converted from rental units to units offered for sale on or after December 1, 1979; provided,

that the provisions of this section shall apply only to Class 1 and Class 2 counties as established by § 8-24-101.

APPENDIX F

IN THE CHANCERY COURT
FOR ANDERSON COUNTY, TENNESSEE

CASTLEWOOD, INC.,

Plaintiff,

vs.

No. 93CH667

ANDERSON COUNTY, TENNESSEE,
PATSY STAIR, TRUSTEE,
OWEN K. RICHARDSON, TAX ASSESSOR,
CITY OF OAK RIDGE, TENNESSEE AND
TENNESSEE STATE BOARD OF EQUALIZATION,

Defendants.

COMPLAINT

(Filed Jun 22, 1993)

Plaintiff seeks judicial review of the action of the State Board of Equalization pursuant to Tenn. Code Ann. §67-5-1511 and related statutes.

1. Castlewood, Inc., is a Tennessee corporation having its office and principal place of business in Oak Ridge, Anderson County, Tennessee. It developed a condominium project consisting of eighty-six (86) residential condominium units located on Arcadia Lane in Oak Ridge, Anderson County, Tennessee (Hereafter referred to as the "Units").

2. Anderson County, Tennessee, provides for the assessment of real property located within Anderson County, Tennessee, and such assessment is carried out by

the duly elected tax assessor. Anderson County, Tennessee, may be served with process upon the County Executive, David O. Bolling.

The responsibility for assessing real property in Anderson County, Tennessee, lies with the County Tax Assessor, Owen K. Richardson.

The collection of real property taxes in Anderson County, Tennessee, rests with the Trustee, Patsy Stair.

All of these Defendants may be served with process in their offices at the Anderson County Courthouse, 100 North Main Street, Clinton, Tennessee 37716.

3. The Defendant City of Oak Ridge imposes a real property tax upon the Units hereinafter described and adopts the tax assessment made by the Anderson County Assessor, Owen K. Richardson. The City of Oak Ridge may be sued by serving process upon the Mayor, Edmund Nephew, at the City Hall, Oak Ridge, Tennessee.

4. The Tennessee State Board of Equalization pursuant to Tenn. Code Ann. §67-6-1501 is charged with the responsibility for the valuation, classification and assessment of all properties in the State as well as being authorized to consider all appeals pursuant to Tenn. Code Ann. §67-5-1501 *et seq*. The Tennessee Board of Equalization may be served with process upon Mr. Kelsie Jones, Executive Secretary for the Board, at Suite 1600, James K. Polk State Office Building, 505 Deaderick Street, Nashville, Tennessee 37219.

Since this Complaint raises issues concerning an agency of the State of Tennessee, the State of Tennessee is joined as a Defendant and may be served through the

office of the Attorney General, Honorable Charles W. Burson, 450 James Robertson Parkway, Nashville, Tennessee 37243-0485.

5. Venue for this action rests with the Chancery Court for Anderson County, Tennessee, the County in which the real property is located and where the disputed property tax assessment was made, as provided for in Tenn. Code Ann. §67-5-1511.

6. Castlewood developed eighty-six (86) residential condominium units generally located on Arcadia Lane in the City of Oak Ridge, Anderson County, Tennessee. It filed the necessary instruments to effect a horizontal property regime which is generally referred to as the "Castlewood Condominium Units". There are nineteen (19) buildings, each containing four to six individual condominium units, and all of the Units are of comparable style and appearance, differing only in size. The entire development was structured pursuant to Tenn. Code Ann. §66-27-101 *et seq.* Each Unit was offered for sale separately as a single unit residence. Three of those units have been sold to purchasers. The remaining Units have been and continue to be offered for sale by Castlewood as separate residential units.

7. Because of a downturn in the economy of Anderson County, Tennessee, and Oak Ridge in particular, Castlewood has not been successful in selling additional Units although they continue to be offered for sale, continue to be viewed by prospective purchasers and there are several Units that are the subject of negotiations leading to a sale.

8. In order to reduce the costs of carrying the Units and to provide for the occupancy of the Units while they are awaiting sale, those Units that have not been sold are made available for occupancy by others on a nightly, week to week, month to month or other short term basis. Condominium fees are being paid to Castlewood by the owners of the three Units that have been sold, and the remaining condominium fees are being paid by Castlewood pending the sale of such Units.

9. Anderson County, Tennessee, acting through its duly elected tax assessor, determined that the Units should be taxed separately and, accordingly, prepared and delivered to Castlewood separate property tax bills for each Unit owned by Castlewood covering the tax year of 1992. At the same time, the Tax Assessor prepared separate property tax bills for the Castlewood Condominium Units that were sold by Castlewood to three (3) separate purchasers.

10. The Tax Assessor determined that the Units owned by Castlewood should be classified as "Industrial and Commercial Property" under the provisions of Tenn. Code Ann. §67-5-801 and imposed an assessment of forty percent of the value of each Unit for determining property taxes. The Tax Assessor also determined that the three Units that were sold by Castlewood should be classified as "Residential Property" pursuant to Tenn. Code Ann. §67-5-801 and imposed an assessment of twenty-five percent of the value of the property for determining those property taxes.

11. The Units that were sold and assessed at twenty-five percent and the Units that were not sold and

assessed at forty percent are identical and cannot be distinguished in any manner in terms of appearance, size, location, construction or by any other objective standard. The only difference is in the ownership of such Units that were not sold and are assessed at forty percent.

12. The Tax Assessor of Anderson County, the City of Oak Ridge accepted the classification and caused the applicable tax rate to be imposed upon the assessment that was so determined and property tax bills were issued accordingly.

13. Castlewood appealed the action taken by the appropriate governmental agencies. The appeal ultimately reached the Assessment Appeals Commission which affirmed the Anderson County Board of Equalization and issued its official certificate on May 4, 1993. The said Certificate is attached hereto as Exhibit A. As provided for in the Certificate, a dissatisfied party is entitled to judicial review by filing a petition in Chancery Court within sixty days (60) of the date of the Certificate. This Complaint is filed pursuant to the Final Decision as reflected in said Exhibit A.

14. The action of the State as reflected in the actions taken by the individual Defendants constitutes an improper classification and assessment of the Units owned by the Plaintiff. Such action discriminates among owners of identical properties and violates the concept of due process, equal protection of the law and fairness of state action.

15. The action of the State and the individual Defendants herein is palpably arbitrary and constitutes

invidious discrimination outside of constitutionally permitted limits and is in violation of the Constitution of Tennessee and the Constitution of the United States.

16. The actions of the State is reflected in the actions taken by the individual Defendants constitute violations of the Tennessee Constitution, Article I, Declaration of Rights, Sections 2, 8 and 21 and Article II, Section 28.

17. The actions of the State as reflected in the actions taken by the individual Defendants constitute violations of the Constitution of the United States and the Fourteenth Amendment thereto.

18. This Court should grant this appeal and declare that the classification of the Units was improper and require the appropriate Defendants to correct their records accordingly to avoid similar misapplication of the statutory property classification hereafter.

WHEREFORE, the Plaintiff prays that the Court set aside the classification imposed upon its Castlewood Condominium Units as Industrial and Commercial Property, require that the Castlewood Condominium Units be classified as Residential Property, require a refund of taxes paid in excess of the taxes that would have been imposed as residential units along with the appropriate prejudgment interest and grant such other further and general relief as it may show itself entitled to upon the hearing of this cause.

Attorney for Plaintiff

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COST BOND

We acknowledge ourselves sureties for the costs incident to the filing of the foregoing document up to $500 this 21 of June, 1993.

BERNSTEIN, STAIR & McADAMS

By: /s/ Bernard & Bernstein

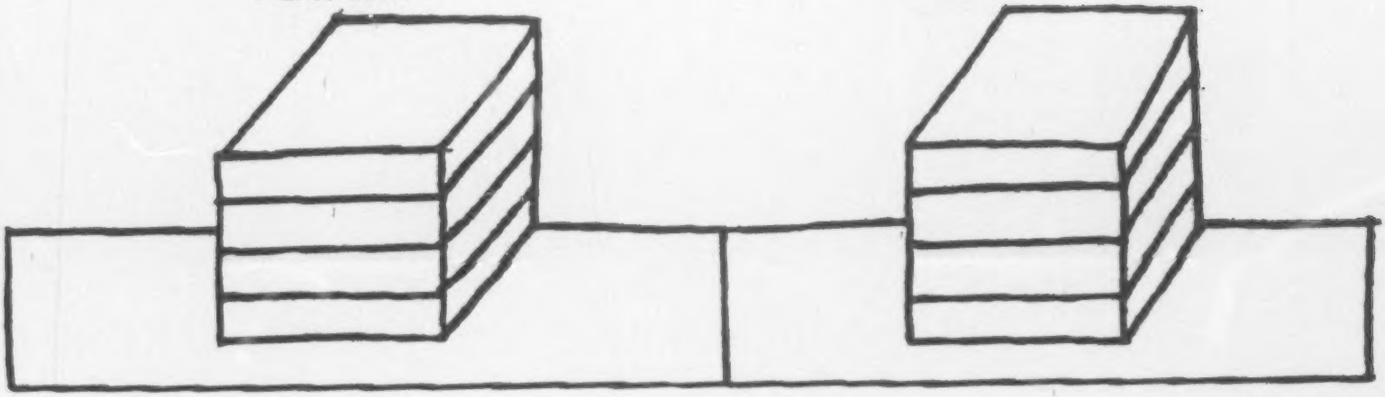
[Exhibit Omitted In Printing]

CONDOMINIUM

4 parcels
1 unit each

APARTMENT

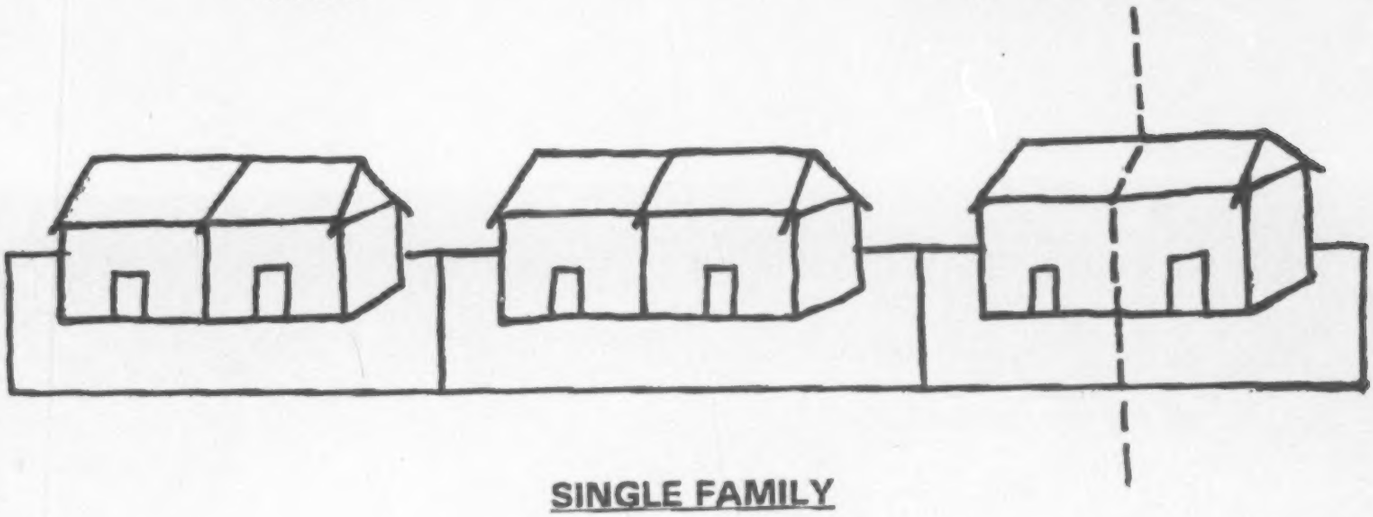
1 parcel
4 units



DUPLEXES

1 parcel
2 units

Zero Lot Line
1 unit on each parcel



SINGLE FAMILY

6 parcels - 1 unit each

(2)

Supreme Court, U.S.
FILED
SEP 30 1998
OFFICE OF THE CLERK

No. 98-361

In The

Supreme Court of the United States

October Term, 1997

CASTLEWOOD, INC.,

Petitioner,

vs.

ANDERSON COUNTY, TENNESSEE, PATSY STAIR, TRUSTEE, OWEN K. RICHARDSON, TAX ASSESSOR, CITY OF OAK RIDGE, TENNESSEE and TENNESSEE STATE BOARD OF EQUALIZATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee

RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

QUESTION PRESENTED

Anderson County does not agree that the petitioner has presented the question fairly. The appropriate question in this case may be stated as follows:

Whether the Constitutional and statutory law of the State of Tennessee, as construed by the Tennessee Supreme Court, relative to the classification and assessment of condominium property for real property *ad valorem* tax purposes, is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, because it provides that two or more condominium units under common ownership in the same structure and used as rental apartments, should be classified as industrial or commercial property, and assessed at 40% of appraised value, while single condominium units, used as owner-occupied residences or as rental property, should be classified as residential property, and assessed at 25% of appraised value.

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Article II, § 28 of the Constitution of Tennessee 1, 2, 4, 9

STATE COURT PROCEEDINGS

The petitioner is incorrect in its assertion that the Tennessee Court of Appeals made any reference to an equal protection issue. The only constitutional issue addressed by that court was the construction and interpretation of Article II, § 28 of the Constitution of Tennessee.

The Tennessee Supreme Court noted that the Tennessee Court of Appeals did not address the equal protection issue. See Opinion, Pet. App. A, p. 2a, n.1:

> The Court of Appeals did not consider the federal constitutional issue but it is asserted on this appeal.

Contrary to the assertions of the petitioner, Pet. at 8, the reference to "fundamental fairness" in the Opinion of the Tennessee Court of Appeals, Pet. App. C, 15a, is not part of an equal protection analysis. It is instead a part of the reasoning process of that court in resolving the question of constitutional and statutory construction relative to the classification and assessment of condominium property, and in carrying out the intent of the framers of Article II, § 28, of the Constitution of Tennessee.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO LEGITIMATE EQUAL PROTECTION ISSUE UNDER THE FACTS IN THIS CASE.

There is no compelling reason to grant the petition in this case, because there is no substantial equal protection issue presented by the decision of the Tennessee Supreme Court.

> Where taxation is concerned, and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produces a reasonable system of taxation.

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 at 359, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973). Moreover, when the equal protection issue arises with regard to classification, if the classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 at 573, 54 L. Ed. 883, 30 S. Ct. 578 (1910).

Considering all the circumstances in this case, there is no colorable equal protection issue arising from the interpretation and construction of the constitutional and statutory law of the state by the Tennessee Supreme Court regarding the classification and assessment of condominium property for real property *ad valorem* tax purposes. Under Tennessee law as established by the decision of the state's highest court, similarly situated condominium owners are treated exactly alike. The owners of single condominium units pay taxes based upon an assessment of 25% of the appraised value. Owners of two or more condominium units in the same structure who rent or lease their units to others for use as apartments pay taxes based upon an assessment of 40% of the appraised value.

This is in accordance with the intent of the applicable provision of Article II, § 28 of the Constitution of Tennessee, relative to the classification and assessment of industrial and commercial property on the one hand, and residential or farm property on the other, with multi-unit income-producing residential properties to be taxed at a higher rate than owner-

occupied residences and farms. *Snow v. City of Memphis,* 527 S.W. 2d 55 (Tenn. 1975); *Louisville & N.R.R. vs. Public Service Commission,* 493 F. Supp. 162 (M.D. Tenn. 1978), *aff'd,* 631 F.2d 426 (6th Cir. 1980), *cert. denied,* 450 U.S. 959, 67 L. Ed. 2d 384, 101 S. Ct. 1418 (1981). The Tennessee Supreme Court has reaffirmed that this is the public policy of the state in the decision now under attack by the petitioner.

The state's constitutional and statutory system for classification and assessment clearly has a rational basis in that it taxes income producing property at a higher rate by applying a higher assessment to the appraised value. Under the facts of this case, where the petitioner constructed some 86 condominium units, in multiple structures of more than two (2) units each, and leases or rents 80 of the units to others for profit in the same way units are rented in apartment complexes, it is not a violation of the rights of the landlord to tax the rental units as industrial or commercial property.

Contrary to the assertion of the petitioner, the taxing authority does not examine the ownership of the units to determine how to classify the property for assessment purposes. Rather, the taxing authority looks to the *use* of the units. Ownership is relevant only to this extent: if the owner of two (2) or more units in the same structure rents or leases them to others, the same are being used as rental apartments, i.e., income producing property, and are to be classified and assessed as industrial and commercial property. In exactly the same way, the owners of multi-unit rental residential apartments are classified and assessed taxes on their income producing properties at the industrial and commercial rate. This is in accordance with the state constitutional mandate:

> Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40%) percent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) percent of its value, ***provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property*** [emphasis added]; and

(d) Farm Property, to be assessed at twenty-five (25%) of its value.

See Constitution of Tennessee, Article II, § 28; Pet. App. D, p. 22a.

The petitioner complains that it is illogical to tax the owner of multiple single-family residence rental properties based on a residential classification while at the same time taxing the owner of multiple rental condominium units in the same structure based on an industrial or commercial classification. Pet. at 10. It can be argued with greater force that it is illogical to have two identical multi-unit apartment buildings side by side, of equal value, and identical in appearance and total value, with one legally constituted as traditional apartments, and one legally constituted as condominiums, with each condominium being under common ownership for use as rental property, yet with the income-producing apartment property being taxed at 40% of the appraised value and the income-producing condominium property being taxed at 25% of appraised value. While there may be logical arguments on both sides of the equation, the classification approved by the Tennessee Supreme Court in this case is consistent with the intent of the state

constitution that multi-unit income producing residential property be classified as industrial or commercial.

The Tennessee Supreme Court has articulated a rational basis for the difference in treatment, and there is clearly support for that conclusion in the constitution, statutes, and case law of the state. The decision of the Tennessee Supreme Court in this case is the definitive statement of the state's policy on the classification and assessment of multi-unit income producing condominium properties. There is nothing discriminatory about either the classification system itself, or the determination that multi-unit rental condominiums should be classified as industrial or commercial. Even the petitioner does not argue that there is no rational basis for taxing industrial and commercial property at a higher rate than single family residences and farms.

As demonstrated by the Tennessee Supreme Court in its discussion of the equal protection issue, there is an obvious rational basis for the classification and assessment provisions of the Constitution of Tennessee and the enabling statutes which are at issue here, which is an intent to tax income producing property at a higher rate than owner-occupied residences and farms. Pet. App. A, 6a-8a. It is equally clear that the Tennessee Supreme Court and Tennessee Court of Appeals have harmonized the constitutional and statutory provisions relative to the classification and assessment of property for tax purposes with the state's horizontal property act. At the same time, those courts declined to read the horizontal property act as an exception to the statutes on classification and assessment, or as a vehicle for circumventing the constitutional and statutory intent that multi-unit income producing apartments or condominiums be taxed at the industrial and commercial rate. Pet. App. A, 3a-5a; Pet. App. B, 13a-15a.

This precise issue was one of first impression in the Tennessee courts. The Tennessee Supreme Court has now clearly stated the law of the state on the property tax question, and at the same time has demonstrated a rational basis for the classification and assessment of the petitioner's 80 rental condominium units.

An owner of a single family dwelling may rent the property to another without losing the residential classification. The owner of a single condominium is treated similarly. It is only where multiple rental units under common ownership in the same building are rented or leased to others that the properties are assessed at the industrial and commercial rate. This classification applies whether the units are apartments or rental condominiums under common ownership. Such circumstances fall clearly within the constitutional intent to classify income producing property as commercial. *Snow* and *Louisville & N.R.R., supra,* p. 3. There is a rational basis for the classification and assessment method on the very face of the constitution and statutes of the state, as construed by the state's highest court.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE TENNESSEE SUPREME COURT IN THIS CASE AND ANY OTHER STATE COURT OF LAST RESORT, ANY UNITED STATES COURT OF APPEALS, OR ANY RELEVANT DECISIONS OF THIS COURT.

Consideration of this case by this Court would not resolve any existing conflict among other courts. As conceded by the petitioner, "[t]his Court has not addressed the simple issues raised in this petition." Pet. 21. Nor does the petitioner argue that the decision of the Tennessee Supreme Court in this case is in conflict with the decision of any other state court of last resort or any United States court of appeals. In fact, none of the considerations governing review on certiorari as set forth

in Rule 10 appear to be applicable in this case. Simply stated, there are no compelling reasons to grant the petition in this case.

While admitting on the one hand that this Court has not addressed the issues raised in this petition, the petitioner argues on the other that the decision of the Tennessee Supreme Court violates the principles expressed in *Allegheny Pittsburgh Coal Co. v. County of Webster County, West Virginia,* 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989) and *Nordlinger v. Hahn,* 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992). However, it is manifest from the Opinions in those cases that the outcome of the inquiry in each case was driven by factual variations in light of the unique property, taxation, and constitutional law of West Virginia and California, respectively.

In *Allegheny Pittsburgh,* the classification was an arbitrary one invented entirely by the local tax assessor, which discriminated against recent buyers of real estate, and had no other basis for the classes or distinctions used in the assessments. Conversely, in the instant case, each member of every class is treated exactly alike, and the owners and renters of multi unit-condominiums are classified and assessed exactly like each other and like the owners and renters of multi-unit apartments. This method more than meets the test that

> the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings.

488 U.S. at 346.

Nordlinger is not authority for the proposition that certiorari should be granted under the facts of this case; indeed

it is much to the contrary. There, a system almost as unfair and oppressive as the "welcome stranger" assessments in *Allegheny Pittsburgh* survived an equal protection challenge. Although there is little factual similarity between California's Proposition 13, which was at issue in *Nordlinger*, and the facts of this case, it is instructive that the treatment of those taxpayers survived.[1] The ultimate conclusion upon a comparison of *Allegheny Pittsburgh* and *Nordlinger* is that the question in this case must be resolved squarely outside anything resembling an equal protection violation.

In the case *sub judice*, not only was the case litigated in light of a question primarily of construction and interpretation rather than an equal protection issue, but the facts which do appear in the stipulation lend themselves to support a conclusion that there is a rational basis for the result approved by the Tennessee Court of Appeals and the Tennessee Supreme Court in the decisions below.

The highest court in Tennessee has made an authoritative interpretation of that state's constitution and statutes relative to the stipulated facts on the classification issue. Apparently no other state has the same constitutional and statutory provisions. While it may be true, as stated by the Tennessee Court of Appeals, that "both parties' positions are well reasoned," Pet. App. C, 15a, and that good arguments can be made on both sides of the question of constitutional and statutory construction, once that question is definitively resolved by the state's highest court, it virtually by definition cannot be an equal protection violation, where, on the facts, every member of each class is treated equally. The horizontal property act has been harmonized with Article II, § 28 and the

1. Justice Stevens, in lone dissent, described the disparate tax burden between new owners and the landed gentry in *Nordlinger* as conferring "a privilege of a medieval character." 120 L. Ed. 2d at 25.

implementing statutes to require the owners of multi-unit rental condominiums in the same building to pay taxes at the industrial or commercial rate, just like the owners of identical multi-unit apartments. Similarly situated property owners are being treated equally, and the classification rests upon the policy ground of taxing multi-unit apartments or condominiums in the same building under common ownership as income-producing industrial or commercial property. The state constitutional and statutory language, as construed by the state's highest court, easily passes muster under the equal protection clause on its face.

III.

THE PETITION SHOULD BE DENIED SINCE IT IMPROPERLY SEEKS REVIEW BY THE SUPREME COURT OF THE CORRECTNESS OF AN INTERPRETATION OF STATE LAW BY THE STATE'S HIGHEST COURT.

The petition in this case is liberally sprinkled with assertions that the decision of the Tennessee Supreme Court is contrary to the constitutional and statutory law of the state.[2]

2. *See e.g.*, Pet. p. 3 ("This taxation scheme is without any basis under Tennessee law. . . ."), p. 9 ("This standard for determining and assessing real property taxes is not authorized in the Tennessee Constitution or the Tennessee Horizontal Property Act."), p. 11 ("The tax assessment scheme and classification adopted by the Tennessee Supreme Court for residential condominium units violates the Fourteenth Amendment because it fails to follow the dictates of Article II, Section 28 of the Tennessee Constitution and the Tennessee Horizontal Property Act.") ("Under Tennessee law, ownership is not a factor to be used in classifying residential condominiums for tax purposes."), p. 12 ("The 1992 Tax Assessment does not comply with the dictates of the Horizontal Property Act."), pp. 13-14 ("By considering the ownership in classifying

(Cont'd)

These arguments ignore the settled rule that a state's highest court is the ultimate authority as to the construction of its constitution and statutes. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955).

Accordingly, to the extent the petition is founded upon an argument that the decision of the Tennessee Supreme Court in this case is not in accordance with Tennessee law, the same does not present a reviewable issue to this Court. *Id.*

By arguing that the classification approved by the Tennessee Supreme Court is not in accordance with Tennessee law, the petitioner in this case reveals the deeper flaw in its equal protection argument: once the classification is made, the petitioner is treated exactly like all other owners of multi-unit rental apartments or condominiums. The petitioner does not argue that the classes themselves violate equal protection, but simply argues that it has been erroneously classified.

(Cont'd)

the Units, the Tennessee Supreme Court improperly classified and approved an unequal tax assessment scheme on absolutely identical properties."), p. 14 ("The decision by the Tennessee Supreme Court approving the 1992 Tax Assessments based on this distinction violates . . . Tennessee law. . . .") ("The Tennessee Supreme Court's argument regarding the 'constitutional intent' of Article II, Section 28 ignores the clear language of Article II, Section 28."), pp. 18-19 ("The Tennessee Supreme Court found that ownership of the property and whether the property was income-producing to be determinative factors in the classifying and assessing different taxes on identical condominium units despite no legal authority to support this finding."), p. 19 ("The 1992 Tax Assessment is improper. The Tennessee Supreme Court relied upon factors that are not supported or mandated by the Tennessee Constitution or applicable statutes.") ("As set forth above, the Tennessee Supreme Court's decision fails to comply with Tennessee law and arbitrarily taxes owners of absolutely identical condominium units differently.").

The petitioner does not argue that members of the same class are receiving disparate treatment. It also does not argue that the establishment of a higher rate of assessment for industrial or commercial property is a violation. The petitioner's argument is really a question of the appropriateness of the classification it has been assigned. When viewed in this light, the question purportedly presented for review in this case evaporates, leaving only a pure matter of state law.

IV.

THE EQUAL PROTECTION ISSUE SHOULD NOT BE CONSIDERED AS IT WAS NOT SQUARELY BRIEFED AND ARGUED AT ANY TIME WHEN THE CASE WAS ON APPEAL, BUT NONETHELESS WAS ADDRESSED BY THE TENNESSEE SUPREME COURT IN ITS OPINION.

The equal protection issue in this case should not be considered at this time because it was not squarely briefed or argued while the case was being appealed from the trial court to the intermediate appellate court and from that court to the state supreme court, but rather, was never addressed in any of the decisions of the courts below until the case was on second-tier appellate review in the state's high court. Pet. App. A, p. 2a, n. 1, pp. 5a-8a.[3]

This case was tried on a stipulation of facts in the trial court, and that stipulation was entered into at a time when the focus of the litigation was upon questions regarding the

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3. The petitioner did allege an equal protection violation in its original complaint. However, that allegation appears with a laundry list of other alleged state and federal constitutional violations, the remainder of which were never pursued in the litigation. Pet. App. F, pp. 49a-50a, ¶¶ 14-17.

construction and interpretation of the Tennessee system of classification and assessment as embodied in its constitution and laws. If an equal protection issue arising from the constitutional and statutory provisions for the classification and assessment of condominium property in Tennessee is going to be addressed by this Court, it should only be done in a case where that was the primary issue being litigated from the outset of the proceedings; rather than where it was not addressed by any court until the case was on appeal. If this Court is inclined to consider this issue, it would be better to do so only after it has been more thoroughly developed in the courts of the state, under the various factual variations which may arise from time to time and from one condominium complex to the next, in light of the fundamental question of construction and interpretation which is now the settled law as articulated by the state's highest court.

CONCLUSION

For the foregoing reasons, and others which may appear to the Court, the petition for writ of certiorari filed in this case should be denied.

Respectfully submitted,

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